What to Do When an Attorney in Your Law Practice Dies or Becomes Incapacitated

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Introduction

- Lawyers have the fiduciary duty to create a plan in the event that they become incapacitated or die
- Lawyers have a duty to protect their clients
- Lawyers should be prepared for a personal disaster whether it be
  - Death
  - Disability
  - Disappearance and/or
  - Disbarment
- Lawyers who do not have a succession plan in the event of death or incapacity leave their clients matters and firms in jeopardy

How is Incapacity Determined in California?

- Under the California Probate Code Section 810-13, California defines incapacity as an inability to make decisions or perform certain acts when at least one of the mental functions are impaired or lacking such as:
    - Inability to understand or communicate with others
    - Problems recognizing familiar people and objections
    - Failure to reason logically
    - Presence of delusions and/or hallucinations
    - Inability to control mood, resulting in actions that are inappropriate in relation to the circumstances
    - Failure to understand and appreciate the consequences of their actions
- In California, incapacity is initially determined by a treated physician

Who can help in the event that a lawyer dies or becomes incapacitated?

- The executor of the lawyer's estate
- The conservator or guardian of the lawyer
- Another lawyer or firm with whom prior arrangements have been made
- The lawyer's surviving spouse, if licensed
- Other attorneys appointed by the Superior Court
  - Pursuant to Business & Professions Code Sections 6180 and 6190
- The purchaser of the practice in the event that the practice is sold

Closing Down a Law Practice

- A law practice may have to be closed permanently, temporarily, completely or partially when a lawyer dies or is physically or mentally unable to practice law.
- There are ethical considerations when closing a law practice such as:
  - Communication to and from clients
  - Communication to opposing counsel
  - Staff has to be retained or terminated
  - Occupancy of the office premises
  - Record and file disposition
  - Tax returns
- Protecting the client's confidentiality, information, and case files
- Prevent other lawyers from offering to help your clients because of solicitation concerns

Selling your Law Practice

- A lawyer who purchase the practice of a deceased or disabled lawyer may, pursuant to the provisions under the **ABA Rule 1.17 Sale of Law Practice** pay to the estate or other representative of that lawyer the agreed upon purchase price

- **ABA Rule 1.17 Sale of Law Practice**
  - Address a lawyer or a law firm may sell or purchase a law practice so long as the seller gives written notice to each of the seller's clients

What is a Succession Plan?

- Succession planning is essential to every lawyer's practice in order to protect their clients in the event of the attorney's disability or death
- Effective succession plans include but are not limited to:
  - Written instructions of how and where client information is stored
    - EX: bank information, account details, trust account information
  - Information concerning disposition of closed client files
  - Information regarding payment of current liabilities
  - Instructions to gain access to computer passwords
  - Information detailing how the successor will be compensated

Succession Plan Continued

- **A succession Plan Should Cover:**
  - Promptness in return client's file
  - Choosing a successor who can take responsibility and conclude the practice
  - Discussions on whether the successor candidate will feel comfortable taking over the cases
  - What replacement counsel will the client's matters be moved to
  - The location of an office manual that details and explains the list of client's names, addresses, open files, deadlines, billing records, etc.

- **Lawyers sharing office spaces** are not parties and thus each attorney should have a succession plan so that clients do not falsely believe that the other attorney in the office will assume responsibility for the cases,

What Procedures Should You Take When An Attorney Is Deceased or Incapacitated?

- If an attorney dies or is disabled resulting in either the cessation of the law practice or the incapacity to attend to the law practice, **Business & Professions Code Section 6180** (cessation) or **Section 6190** (incapacity) can come into play if there are unfinished client matters for which no other active member of the State Bar has (with the consent of the client) agreed to assume responsibility

- Effective procedures included but are not limited to:
  - Ask local court clerk to run a computer search to determine if the attorney has any open matters
  - Take possession and protect all computers
  - Look for desk calendars for information on cases in process and due dates
  - Check attorney client trust accounts and inform the bank to put a freeze on the account
  - For closed offices, notify post office to prevent mail and important documents from being delivered
  - In most jurisdictions, the Superior Court will have a system for deposit of non-returnable client wills

ABA Rule 28: Model Rules for Lawyer Disciplinary Enforcement

- **Inventory of Lawyer Files:** When an attorney becomes incapacitated or dies and there is no partner, executor or other responsible party capable of conducting the attorney's affairs, the presiding judge in the judicial district in which the attorney maintained a practice, upon proof of the fact, shall appoint a lawyer or lawyers to inventory the files of the attorney and to take such action as seems indicated to protect the interests of the respondent and his or her clients.

- **Protection for Records Subject to Inventory:** Any lawyer so appointed shall not be permitted to disclose any information contained in any files inventoried without the consent of the client to whom the file relates, except as necessary to carry out the order of the court which appointed the lawyer to make the inventory.

- The **lawyer-client privilege** must be extended so that review of the file by the trustee is not deemed to be disclosed to a third party, which would waive the privilege

Sole Practitioner – Rule 1.1

- Under the California Rules of Professional Conduct Rule 1.1:
  - A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence
- A Sole practitioner must comply with the **Diligence** requirements under Rule 1.3
- Under the California Rules of Professional Conduct Rule 1.3
  - Comment 5: "To prevent neglect of client matters in the event of a sole practitioner's death… the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death…and determine whether there is a need for immediate protective action…"

Sole Practitioner Continued

- If you are a sole practitioner the executor or administrator of your estate will be responsible for notifying your clients of your incapacitation or death
- The executor or administrator is responsible for returning the client's files
- The local superior court may appoint a practice administrator
- The deceased attorney's law practice may be sold to another member of the bar so long as it is permissible to do so under the California Rules of Professional Conduct

What happens if a sole practitioner does not leave a person in charge of his estate?

- The State Bar or Local County Bar Associations may assist in winding down the practice of law
- Typically, these associations must receive authorization from the Superior Court in their local county or state for approval
- A non-attorney spouse or relative or personal representative of the attorney's estate may be able to examine the files and assist in closing down the practice
- A court assuming jurisdiction over a law practice may make all orders which are necessary or appropriate to exercise its jurisdiction [Bus. & Prof. Code Section 6180.5]

Deceased Attorney Involved in a Law Firm or Partnership

- If an attorney becomes incapacitated or deceases in your law firm or partnership, the law firm would maintain custody of the client's file

- It is important for the assisting lawyer and the affected lawyer to discuss the details of what role the assisting lawyer is to play in the event of death or incapacitated

- Transitioning clients to other attorneys
  - What information about the affected attorney can be revealed to clients
  - How deep into the client file can the affected attorney go for purposes of protecting client confidentiality
  - Whether the transitioning attorney can take on the affected attorney's client given the law firms current and former clients.

Accessing Funds in Lawyer's Trust Accounts

- Appointing an assisting or transitionary attorney is important for the transitionary attorney to access funds held in the affected attorney's trust accounts.
- It is important for an assisting attorney to sign on your account in the event of death or incapacity
- When there is no back up attorney authorized to approve IOLTA disbursements in the event of death or incapacity, a relative, spouse, or the deceased attorney's estate has to go through the process of getting motions filed in order to direct the bank to release the IOLTA funds.
- It is important to arrange an assisting attorney to access the IOLTA account to avoid the deceased or incapacitated lawyer's relatives or spouses from being liable for a malpractice claim arising form a client who is unable to secure adequate representation because funds were held in the deceased attorney's IOLTA.
- Other options to protect client's IOLTA Disbursements are:
    - To create a "payable on death" or "transfer on death" arrangement with the financial institution

Your Fiduciary Obligations

- Write down passwords to your computer and phones
- **Plan Ahead:**
  - Avoid your family members having to be posed with questions of clients who are demanding their files or money returned to proceed with their case
- As a **Transitionary Attorney** you must consider:
  - Ethical obligations and responsibilities for:
    - Winding down the affected attorney's office
    - Business and Professional Ethics Code
    - Representing clients that may be a conflict of interest
    - Maintaining the Attorney Client Privilege and Confidentiality

HYPOTHETICAL #1

- What happens if the assisting or transitioning attorney discovers malpractice or misappropriation of client funds which transition active cases from a affected attorney who is incapacitated or has died?

HYPOTHETICAL #2

- Whose interest is the assisting attorney suppose to protect?
    - Defining the relationship of the transitioning attorney and the affected attorney prior to the attorney's death or incapacity is important when the assisting attorney has a duty to report the error to the client, as well as the assisting attorney's own ethical duties
- When there is ambiguity based on the attorney-client relationship, case law suggests that courts typically apply the viewpoint of what would be the reasonable belief of the client whose matter was being transitioned.

HYPOTHETICAL #3

- Wendy is a sole practitioner and has just passed away. Wendy has appointed Elizabeth as her assisting and transitionary attorney.
- Elizabeth has obtained all client information because Wendy provided Elizabeth with the passwords and case information in the event that she became incapacitated or died.
- After conducting a conflict check, Elizabeth finds out that one of Wendy's current clients was the Defendant in a civil matter that Elizabeth represented the Petitioner two years ago. Elizabeth no longer represents the Petitioner.
- What should Elizabeth do?

HYPOTHETICAL #4 Part A

- Vivian is an attorney in a law firm consisting of two other attorneys named Sarah and Shawn. Within the last few months Vivian has been forgetting client information, misplacing items, and has forgotten to appear to 5 hearings. Would a physician consider Vivian to be incapacitated?

HYPOTHETICAL #4 Part B

- Assuming that Vivian was deemed to be incapacitated, what is the law firms best course of action in order to ensure that all of Vivian's clients are taken care of in their upcoming proceedings?

HYPOTHETICAL #4 Part C

- What should Sarah and Shawn do before proceeding to contact her clients?
- What are some important things that Vivian should have done prior to becoming incapacitated?

HYPOTHETICAL #4 Part D

- What are some important things that Vivian should have done prior to becoming incapacitated?

Sources

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